Civil Law Ordinance, 1956. Accordingly there shall be no award of interest.

I award costs to the plaintiffs.

Order accordingly.

Solicitors: *Murphy & Dunbar; Shearn Delamore & Co.*

SINGER SEWING MACHINE CO. v. JEREMIAH

[F.C. (Ong C.J. (Malaya), Gill & Ong Hock Sim F.JJ.)

August 7, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 34 of 1972]

Practice and Procedure — Appeal — Application for extension of time to file record of appeal — Notice concerning appeal record having gone astray — Disregard of a mandatory rule — Manifest injustice to aggrieved litigant — — Duty of court — Subordinate Courts Rules, 1950, O. 39 r. 3(2), O. 36 rr. 7 and 19, Form 40.

This was an appeal from the decision of the High Court, Seremban ([1972] 2 M.L.J. 56) which had refused to exercise its discretion in favour of the appellants/applicants to allow an extension of time to file their memorandum of appeal. In disallowing the application, the judge criticized the conduct of the appellant company and their solicitors.

Held, allowing the appeal: in the court below, the judge's strictures on the appellants and their solicitors were unwarranted. To deny them, *in limine*, the right to appeal against the decision of the magistrate on the merits, when the notice in Form 40 had gone astray, and in disregard of a mandatory rule, is to do a manifest injustice to an aggrieved litigant. The respondent should not have opposed the application.

FEDERAL COURT.

K. L. Rekhraj for the appellants.

Leong Tuck Onn for the respondent.

Ong C.J. (Malaya): On January 9, 1971 judgment was given against these appellants by the magistrate at Kuala Pilah in Civil Action No. 65 of 1969. They filed notice of appeal through their solicitors on January 11, 1971. Order 39 rule 3(2) of the Subordinate Courts Rules provides that "as soon as the appeal record is ready the court appealed from shall serve the appellant with a notice in Form 40"; sub-rule (5) then requires the appellant, within 14 days of such notification, unless the court for sufficient cause otherwise orders, to deposit in such court a sufficient sum to cover the cost of preparing the appeal record and also lodge in court $150 as security for costs.

On February 17, 1972 — which I consider an inexcusably long time to prepare the appeal record — the notice in Form 40 was issued. Under Order 8 rule 1, where a party is represented by a solicitor on the record, "the address of such solicitor *shall* be the address for service". This rule is clearly mandatory, but heedless thereof, the process server of the court took the liberty of serving the notice on the appellants at their Petaling Jaya office, where it lay unnoticed by whomsoever it was handed to. On February 25, 1972 the appellants' solicitors were informed over the telephone by the Kuala Pilah court that time was running out. They forthwith remitted the sum of $271 as required, with a covering letter applying for such extension of time as may be necessary to comply with the rules of court. They were, however, directed to make the application to the High Court at Seremban, in the belief that the magistrate's court had no power to grant such extension. This was wrong. In the Subordinate Courts Rules "court" is defined as meaning "a Sessions Court or a Magistrates' Court and the President of a Sessions Court or a Magistrate, as the case may be..." and Order 36 rule 7 clearly states that "the court may extend or abridge the time limited for doing any act, upon such terms as may be just, notwithstanding that the time originally limited has expired". Rule 19 goes on to provide: "Nothing in these Orders and Rules shall be deemed to limit or affect the inherent power of the court to make such orders as may be necessary to prevent injustice or to prevent abuse of the process of the court" The magistrate at Kuala Pilah, therefore, should have allowed the application without further ado

The appellants, being so directed by the magistrate, filed notice of motion in the High Court on March 11, 1972. The application was opposed by the respondent and it was dismissed with costs. I do not think it necessary to go over the grounds given by the judge. Suffice it to say that, in my opinion, his *strictures on the appellants and their solicitors were unwarranted.* To deny them *in limine* the right to appeal against the decision of the magistrate on the merits, when the notice in Form 40 had gone astray — and in disregard of a mandatory rule — is to do a manifest injustice to an aggrieved litigant.

The respondent should not have opposed the application. It is therefore only just that this appeal be allowed with costs to the appellants in any event. The appellants will have 14 days from the date hereof for filing the appeal record.

Gill and **Ong Hock Sim F.JJ.** concurred.

Order accordingly.

Solicitors: *K. L. Rekhraj & Co.; Kam Woon Wah & Co.*